TIOW WENG THEONG v. MELAWANGI SDN BHD & OTHER CASES

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[SUITS NO: 22-1993-2008, 22-1988-2008, 22-1986-2008 & 22-1946-2008]
30 JULY 2015

CIVIL PROCEDURE: *Discovery – Application for – Discovery of documents – Whether application for discovery of documents ought to be granted when applicant failed to specify documents – Whether documents sought relevant to applicant's defence and issues to tried – Whether production of documents necessary for a fair disposal of case – Rules of Court 2012, O. 24*

The plaintiff's claim against the defendants was for defamation based on statements published by the defendants. On 5 December 2013, the plaintiff's solicitors served their bundle of documents ('BOD') on the defendants' solicitors. On 6 February 2014, the defendants' solicitors wrote to the plaintiff requesting to be supplied several documents ('subject documents') in the custody of the plaintiff within seven days. Subsequently, the defendants went on to file notices of application dated 20 February 2014 for an order of discovery. The notices of application were allowed by the High Court. Dissatisfied, the plaintiff appealed to the Court of Appeal ('COA') against the High Court's decision. The appeal was allowed but the COA gave liberty to the defendants to commence a fresh application for discovery. Hence, the present applications by the defendants for discovery pursuant to O. 24 r. 12 and/or O. 92 r. 4, Rules of Court 2012 ('ROC') on the grounds, *inter alia*, that an order of discovery was relevant to the defendants' defence and issues to be tried. Against the defendants' application, the plaintiff argued that since the defendants had filed their amended statement of defence and pleaded various defences to the impugned defamatory statements, it could be presumed that the defendants already had facts and relevant documents in support of the defences.

Held (dismissing defendant's application with costs):

(1) The defendants had not established the relevancy of the subject documents to their pleaded defences that necessitated discovery to be made of the same. Neither had they shown that the documents were important to their defence and the issues raised apart from bare assertions to this effect. The impugned statements were made by the defendants with full knowledge as to their truth or falsity and their implications. As such, the purported reliance on the plaintiff's documents to prove the truth of the impugned statements, on which their pleaded defences are based, should not arise. (para 9)

(2) An essential criterion that the applicant for discovery had to satisfy was that the document had to be identified specifically and its importance to the applicant's case or defence had to be satisfactorily shown. Otherwise, the discovery exercise would be regarded as a 'fishing exercise' to prop up the claim or defence of the applicant that would be unjust or oppressive to the opposing party. (para 10)

(3) The list of documents sought to be discovered had been described in general terms without reference to particular documents and how they would be important to support the specifically pleaded defences to the claim. The description of the documents did not satisfy the requirement for the documents sought to be discovered to be identified specifically for the court to decide whether it would be just and necessary to order the discovery prayed for. It is expressly provided in O. 24 r. 13 of the ROC that discovery would only be ordered if it is necessary for the cause or matter to be fairly disposed of. (para 12)

(4) No reasonable or plausible explanation was proffered by the defendants for the unreasonable and inordinate delay in filing the first application for discovery only on 20 February 2014 more than two months after receiving the plaintiff's BOD on 5 December 2013. An order for discovery that was unduly oppressive and prejudicial to the plaintiff in pursuing its action expediently would not be granted. Under the circumstances, the plaintiff had not shown that the present application at such a late stage was *bona fide* and necessary in the interests of justice and fair disposal of the present proceedings. (para 13)

Case(s) referred to:

Manilal & Sons Pte Ltd v. Bhupendra Kumar J Shan [1990] 1 CLJ 623; [1990] 3 CLJ (Rep) 786 HC ***(refd)***

Rotta Research Laboratorium Spa & Anor v. Ho Tack Sien & Ors [2010] 10 CLJ 491 HC ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 24 rr. 3, 12, 13, O. 92 r. 4

For the plaintiff - Dhanaraj Vasudevan (Davendra Balasingam with him); M/s Kamil Hashim Raj & Lim

For the defendants - CJ Siew; M/s Douglas Yee

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy JC:

[1] These are similar discovery applications by the defendants in the abovenamed four suits against the common plaintiff/respondent pursuant to O. 24 r. 12 and/or O. 92 r. 4, Rules of Court 2012 ('ROC').

[2] An order for discovery in any cause or matter is governed by O. 24 r. 3 ROC which states that:

> Order for discovery (O. 24, r. 3)
>
> 3. (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.
>
> (4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:
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> (a) the documents on which the party relies or will rely; and
>
> (b) the documents which could
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case.

O. 24 r. 12 under which this application is made provides that:

> Order for production to Court (O. 24, r. 12)
>
> 12. (1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:
>
> (a) documents on which the party relies or will rely;
>
> (b) documents which could:
>
> (i) adversely affect a party's case; or
>
> (ii) support a party's case; and
>
> (c) documents which may lead to a series of inquiry resulting in the obtaining of information which may:
>
> (i) adversely affect a party's case; or
>
> (ii) support a party's case.
>
> (2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

[3] A leading and oft-cited authority on pre-trial discovery of documents is *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 where Edger Joseph Jr J (as he then was) held:

> The essential elements for an order for discovery are threefold; namely, first there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[4] For an order of discovery to be made relevancy of the documents concerned to the claim or defence is a vital consideration. In the Singapore case of *Manilal & Sons Pte Ltd v. Bhupendra Kumar J Shan* [1990] 1 CLJ 623; [1990] 3 CLJ (Rep) 786 Chao Hick Tin J remarked:

> Under the general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action.

[5] Briefly, the defendants sought discovery of the following documents in the possession, custody and power of the plaintiff:

(a) Proxy form used in the first AGM on 8 April 2008 and list of employees of Melawangi Sdn Bhd as of 8 April 2008 (para 9 (a) statement of claim and para. 6.1 - 6.5 statement of defence).

(b) Document for appointment and payment of Archer Corporate Services Sdn Bhd by Melawangi Sdn Bhd to conduct the AGM (para 9(a) SOC and para. 6.3 amended defence).

(c) Documents relating to any contracts for the lease of the outer wall façade of Amcorp Serviced Suites for the year of 2000 - 2014 (para. 7.8 amended defence).

Background Of Case/Chronology

[6] The plaintiff's claim against the defendants is for defamation based on statements alleged to be defamatory published by the defendants *vide* certain documents.

[7] On 5 December 2013, plaintiff's solicitors served their bundle of documents on the defendants' solicitors. On 6 February 2014, the defendants' solicitors wrote to the plaintiff's solicitors requesting to be supplied several documents ('the subject documents') in the custody of the plaintiff within seven days from 6 February 2014. On 17 February 2014, plaintiff's solicitors replied that they required an extension of time to supply the subject documents. However, on 20 February 2014, the defendants filed notices of application dated 20 February 2014 for an order of discovery.

[8] On 26 May 2014, the above notices of application were allowed by the Shah Alam High Court with costs to be paid by the defendants. On appeal by the plaintiff to the Court of Appeal against this decision, the appeal was allowed with costs on 13 November 2014 but the Court of Appeal gave liberty to the defendants to commence a fresh application for discovery. Hence, the present applications dated 2 December 2014 by the defendants for discovery.

Grounds Of Application

(a) The Court of Appeal on 14 October 2014 dismissed the similar application with liberty to file afresh in the High Court. The previous application in High Court was dismissed prior to the extraction of documents.

(b) Order for discovery is relevant to the defendant's defence and issues to be tried.

Finding

[9] First and foremost, the onus is on the defendants to establish relevancy of the documents sought to be produced to their defence and the contentious issues to be tried arising from the plaintiff's action. In this regard, as contended by the plaintiff, an important factor to be considered is the fact that the defendants had already filed their amended statement of defence on 28 October 2013 and pleaded various defences to the impugned defamatory statements such as justification, fair comment and qualified privilege. As such, it could be presumed that the defendants had the facts and relevant documents in support of the defences that they had advanced. It was the plaintiff's contention that at all material times the defendants must have had full knowledge as to the truth of the alleged defamatory statements as claimed and the purported invalidity of the claim for libel for them to plead the aforesaid defences. In my view, the plaintiff had rightly contended that the defendants had not established the relevancy of the subject documents to their pleaded defences that necessitated discovery to be made of the same. Neither had they shown that these documents were important to their defence and the issues raised apart from bare assertions to this effect. As contended, the impugned statements were made by the defendants with full knowledge as to their truth or falsity and their implications. As such, the purported reliance on the plaintiff's documents to prove the truth of the impugned statements, on which their pleaded defences are based, should not arise.

[10] Secondly, an essential criterion that the applicant for discovery has to satisfy is that the document has to be identified specifically and its importance to the applicant's case or defence has to be satisfactorily shown. Otherwise, the discovery exercise would be regarded as a 'fishing exercise' to prop up the claim or defence of the applicant that would be unjust or

A oppressive to the opposing party and accordingly, should not be permitted. This proposition was expressed clearly by the Court of Appeal in *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise & Ors* [2009] 5 MLJ 40 as follows:

> The court would dismiss a ... application for discovery if the plaintiff is
B merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery.

[11] On this point, the correct position was stated by Mah Weng Kwai JC (as he then was) in *Rotta Research Laboratorium Spa & Anor v. Ho Tack Sien & Ors* [2010] 10 CLJ 491 where His Lordship held:

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> To my mind, the plaintiffs have shown that the defendants' Annexure B sought to be discovered has satisfied the three criteria namely:
>
> (a) the document has been identified specifically
>
> (b) it is relevant to the plaintiff's case and
>
D (c) it is in the possession of the defendants

[12] In the instant cases, a perusal of the list of documents sought to be discovered would disclose that they have not been sufficiently identified specifically. The documents in question have been described in general terms
E without reference to particular documents and how they would be important to support the specifically pleaded defences to the claim. In my view, the description of the documents does not satisfy the requirement for the documents sought to be discovered to be identified specifically for the court to decide whether it would be just and necessary to order the discovery prayed for. It is expressly provided in O. 24 r. 13 that discovery will only
F be ordered if it is necessary for the cause or matter to be fairly disposed of.

[13] Next is the question of inordinate delay by the defendants in making this application which has been filed at a belated stage for a whole series of documents when the matter has been set down for trial after close of
G pleadings and all bundles of documents ('BODs') have been filed and exchanged. This suit was commenced way back in the year 2008 and the plaintiff served its BOD on the defendants on 5 December 2013. No reasonable or plausible explanation was proffered by the defendants for the unreasonable and inordinate delay in filing the first application for discovery only on 20 February 2014 more than two months after receiving
H the plaintiff's BOD on 5 December 2013. An order for discovery that is unduly oppressive and prejudicial to the plaintiff in pursuing its action expediently will not, in principle, be granted. Under the circumstances, the plaintiff has not shown that this application at such a late stage is *bona fide* and necessary in the interests of justice and fair disposal of the present
I proceedings.

Conclusion

[14] Order 24 r. 13 ROC is explicitly clear that an order for the production of any documents for inspection or to the court under this Order is to be made only if necessary. It states in sub-r. (1) in no uncertain terms that:

> Production to be ordered only if necessary (O. 24 r. 13)
>
> 13. (1) An order for the production of any documents for inspection or to the Court shall not be made under any of foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

[15] On the foregoing grounds as elaborated, I found that these applications were in law and fact without basis and/or merits. I, accordingly, dismissed the application in all four cases with costs in the cause.